FILED
DEC 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-694

GENERAL STEEL PRODUCTS COMPANY,
A DIVISION OF THE SENG COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE AMERICAN RETAIL FEDERATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE AMICUS CURIAE*

The American Retail Federation is an organization composed of seventy-eight national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all respects of the retail industry. Through these associations, the Federation represents

* This brief in support of the petition for a writ of certiorari is being filed with written consents of all parties to this proceeding. Pursuant to Supreme Court Rule 42(1), said written consents have been lodged with the Clerk of the Court.

approximately eight hundred thousand retailers with close to six million employees. The Federation was an *amicus* in the instant case, and participated in oral argument, before the Court of Appeals.

The decision of the court below—permitting the Labor Board, for the first time in the four decades of its administration of the Act, the power to conduct a representation election in the absence of a viable election petition—presents a recurrent question of substantial interest to the Federation's membership. *First*, Section 9(c)(1) of the Act expressly requires that representation elections may be held only upon a legally sufficient petition having been filed by a union, group of employees, or employer. Absent such a petition, the Board may not conduct an election. By permitting the Board to order an election here, where there was no such petition pending, the Court of Appeals emasculated this plain requirement of the Act. *Second*, where, as here, the Board renounces the election process and seeks a bargaining order, and thereafter either a court or the Board itself determines that such an order is not warranted, that should end the matter. An employer should not be put to additional penalization or an attempt by the Board to secure indirectly what it cannot obtain directly.

ARGUMENT

This case, as the court below recognized (Pet. App. 2-4), has had a long and checkered history. From 1964 to 1966, an election petition was pending which was dismissed by the Board itself when it issued a bargaining order (157 NLRB No. 59); from 1966 to 1972, the Board pursued the bargaining order route and ignored the election petition until, after it finally concluded that the Company had been correct throughout and no bargaining order was, in fact, justifiable, it then reverted (199 NLRB No. 121) on its own initiative to the election course it had earlier forsworn. The question presented here is the

Board's authority to deviate from one representation approach to another in such a cavalier and inconsistent manner and to impose, where a bargaining order is found not to be warranted, an alternative penalty: reinstatement of a previously-dismissed election petition.

1. The Board, of course, has no power to issue "punitive" orders. *Local 60, U. B. of C. & J.* v. *N. L. R. B.*, 365 U. S. 651, 655 (1961). In the circumstances of this case, the Board's reinstatement of the election petition was punitive. It was an attempt to secure a lesser penalty when the Board's first choice of remedy, a bargaining order, had been found wanting. There is no basis, however, where an employer has been absolved of liability under section 8(a)(5) of the Act, to order *any* remedy. The union is free to file, if it so desires, a new petition. For the Board to take such action on its own, absent such an affirmative step by the union, is to impose indirectly the very post-*Gissel*[1] approach condemned by numerous courts of appeals.[2] It penalizes an employer, apparently in a misguided attempt to promote collective bargaining,[3] where that employer is not guilty of any violation of the Act. Indeed, the present case goes even *further* than the requirement of the District of Columbia Court of Appeals in *Linden Lumber*[4] that an employer who rejects an authorization card based bargaining demand must file an election petition if he refuses recognition and commits no

1. *N. L. R. B.* v. *Gissel Packing Co., Inc.*, 395 U. S. 575 (1969).

2. See, *e.g.*, *N. L. R. B.* v. *American Cable Systems, Inc.*, 427 F. 2d 446 (5th Cir. 1970), *cert. denied*, 400 U. S. 597 (1970); *N. L. R. B.* v. *General Stencils, Inc.*, 438 F. 2d 894 (2nd Cir. 1971); and *N. L. R. B.* v. *Gibson Products Co.*, 494 F. 2d 762 (5th Cir. 1974).

3. See, *e.g.*, *N. L. R. B.* v. *Savair Mfg. Co.*, 414 U. S. 270, 94 S. Ct. 495, 499 (1973) ("the Act is wholly neutral when it comes to that choice [of unionization]"); and Summers, *Freedom of Association and Compulsory Unionism in Sweden and the United States; a Comparative Study*, 112 U. Pa. L. Rev. 647, 665-67, 694-95 (1964).

4. *Truck Drivers Union Local 413* v. *N. L. R. B.*, 487 F. 2d 1099 (D. C. Cir. 1973), *cert. granted sub nom., Linden Lumber Division, Summer & Co.* v. *N. L. R. B.* (No. 73-1231).

election-interfering unfair labor practices. The Board in *Linden* (which is now on certiorari pending decision by this Court) professed not to have the power to require an employer to file an election petition. *A fortiori,* it is submitted, the agency cannot direct an election without any viable petition on file at all.

2. The Board, moreover, as the Petition (p. 9 n. 2) demonstrates, has taken a virtually unprecedented step in the instant case which it has heretofore declined to take with respect to other similarly-situated employers. Apart from the questionable validity of its actions under section 9(c)(1) of the Act, the violence to finality in administrative process, and the inconsistency with representations of the Board before various appellate courts (See Pet., pp. 9-15), the Board must surely "explain its imposition of a remedy in one case and its failure to do so in a seemingly similar [situation]" *N. L. R. B.* v. *General Stencils, Inc.*, 438 F. 2d at 905; see also *N. L. R. B.* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438 (1965). It has failed to comport with this requirement in the instant case.

3. When an election petition is "blocked" by an apparently meritorious refusal to bargain charge, the Board's practice is that followed here—dismissal of the petition under section 11730.4(d) of the Board's public policy manual. The petition is no longer considered pending (Pet. App., p. 34) nor otherwise held in abeyance. The dismissal is, as it was here, final and unconditional. It is not subject, as the Board proposes here, to a condition subsequent: reinstatement if there is a failure to prove an unfair labor practice. This radical departure from the agency's own rules warrants review by this Court.

CONCLUSION

This case presents an important and recurrent question in the administration of the Act. For the reasons described above, as well as those set forth in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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